Supreme Court, U.S
FILED

991063 DEC 16 1999

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term - 1999

JACQUE BOYLE,

Petitioner,

-vs-

INTERNAL REVENUE SERVICE, an entity of the United States government; MARGARET RICHARDSON, Director, Internal Revenue Service; JANET BROWN; FATEMA MOHIUDDEN; TWELVE UNNAMED INTERNAL REVENUE SERVICE AGENTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court's grant of Summary Judgment, and dismissal of plaintiff's action, based on that Court's erroneous determination of contested issues of fact by reliance on defendants' declarations and opinions, and in reliance on statutes and case law in error, and the Court of Appeal's affirmation thereof, constitute substantive error and a denial of due process, requiring this Court's intervention to protect the plaintiff's constitutionally protected rights and the rights of others similarly situated?

2. Was plaintiff/taxpayer deprived of his business premises, business assets, law office operation, and client files without due process of law and in violation of his right to be free from unreasonable searches and seizures, all by IRS agents', requiring this Court's intervention to redress that wrong?

3. May a Taxpayer recover his damages from IRS agents, suffered as a result of such agents' unauthorized,

unwarranted, and illegal acts:

A. When the IRS agents acted within the course and scope of their agency, or;

B. When the IRS agents' acts are not intended to, and do not, collect any taxes, when the Order for Entry was obtained through false oaths (perjury), were specifically unauthorized, and when such acts resulted in the loss of future IRS revenue?

4. Is a Taxpayer without a remedy to recover his damages suffered because of IRS agents' unauthorized, unwarranted, and illegal acts?

PARTIES

Petitioner, JACQUE BOYLE, is the plaintiff in the lower Court, and a taxpayer seeking damages from wrongful conduct of IRS agents.

Respondent INTERNAL REVENUE SERVICE was replaced by the UNITED STATES OF AMERICA, a sovereign entity.

Respondents JANET BROWN, FATEMA

IOHIUDDEN, and TWELVE UNNAMED INTERNAL

EVENUE SERVICE AGENTS, are Internal Revenue

ervice Agents, all involved in the acts and conduct giving

se to this Lawsuit, and respondent MARGARET

ICHARDSON was the Director of the INTERNAL

EVENUE-SERVICE, at all time relevant to this action.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

REFERENCES TO OPINIONS, DECISIONS, AND JUDGMENTS OF THE LOWER COURTS .. 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED .. 3

STATEMENT OF THE CASE 4

I. Nature of the Action 4

II. Summary of Material Facts 5

III. Proceedings to Date 7

IV. Federal Questions Raised In the Court of Appeal 9

REASONS FOR ALLOWANCE OF WRIT 11

1. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, AND DISMISSAL OF PLAINTIFF'S ACTION, AND THE COURT OF APPEAL'S AFFIRMATION THEREOF,

CONSTITUTED ERROR OF CONSTITUTIONAL MAGNITUDE, REQUIRING THIS COURT'S INTERVENTION TO PROTECT THE PLAINTIFF'S RIGHTS, AND THE RIGHTS OF OTHERS SIMILARLY SITUATED .....

2. **PLAINTIFF/TAXPAYER WAS DEPRIVED OF HIS BUSINESS PREMISES, BUSINESS ASSETS, LAW OFFICE OPERATION, AND CLIENT FILES WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF HIS RIGHT TO BE FREE FROM UNNECESSARY SEARCHES AND SEIZURES, BY IRS AGENTS, REQUIRING THIS COURT'S INTERVENTION TO REDRESS THAT WRONG.** 15

3. **THE DISTRICT COURT REJECTED TAXPAYER'S LAWSUIT TO RECOVER HIS DAMAGES FROM IRS AGENTS, SUFFERED AS A RESULT OF SUCH AGENTS' UNAUTHORIZED, UNWARRANTED, AND ILLEGAL ACTS IN DENIAL OF TAXPAYER'S CONSTITUTIONAL RIGHTS AND PRIVILEGES.** 16

A.. Sovereign immunity does not always shield an IRS agent acting in the course and scope

of his/her agency. .....

B. The Defendants' Acts Here Were Unnecessary, Unwarranted and Unconstitutional. .....

4. THE DISTRICT COURT'S DECISION AFFIRMED BY THE COURT OF APPEAL, LEFT THE TAXPAYER WITHOUT A REMEDY TO RECOVER HIS DAMAGES SUFFERED BECAUSE OF IRS AGENTS' WRONGFUL ACTS AND CONDUCT. .....

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

Bell v. Hood 327 U.S. 678,
at 684 (1946) . . . . . .

Bivens v. Six Unknown Named Agents
of Federal Bureau of Narcotics
403 U.S. 388, 29 Lawyers Ed.2d 619 . . . . . .

Byrnes v. Mutual Life Ins. Co. of N.Y.,
C.A.Ariz. 1955, 217 F.2d 497,
certiorari denied 75 S.Ct. 532,
348 U.S. 971 . . . . . .

Insurance Co. of North America v.
Morrison, M.D.Fla.1993, 818 F.Supp. 1519 . . . . . .

Pacific Electric R. Co. v. Los Angeles, Cal.
1904, 24 S.Ct. 586, 104 U.S. 112 . . . . . .

Rice v. Sioux City Memorial Park Cemetery
(1955) 349 U.S. 70; 28 U.S.C. 1331 . . . . . .

Sullivan v. Little Huntington Park,
396 U.S. 229, at 238-240 . . . . . .

U.S. v. Lockheed L-188 Aircraft,
C.A.Or.1979, 656 F.2d 390;
28 U.S.C. §1346 . . . . . .

STATUTES AND REFERENCES

California Civil Code, §3510 .....
California Civil Code, §3523 .....
California Civil Code, §3528 .....

Appendix to 28 CFR 15.3 (1990), 28 U.S.C. 2679(d)
as amended by Public Law 100-694 .....

H.R. Doc. No. 124, 88th Congress,
First Session, 1963 .....

Common Law Tort Claim Act .....

CONSTITUTIONS

United States Constitution,
Fourth Amendment .....
Fifth Amendment .....

REFERENCES TO OPINIONS, DECISIONS, AND JUDGMENTS OF THE LOWER COURTS

The following Appendices are attached:

APPENDIX A: The Order for Entry on Premises to Effect Levy of the District Court for entry of the taxpayer's premises. App. A (In the Matter of the Tax Indebtedness of Jacque Boyle, case number 96-6967 JGD, to which the District Court is asked to take judicial notice.)

APPENDIX B: Opinion and decision of the District Court. App. B (The opinion and decision of U.S. District Court, Central District of California.)

APPENDIX C: The Memorandum. App. C (Opinion and decision of the Ninth Circuit Court of Appeals is set forth.)

JURISDICTION

The MEMORANDUM of the Court of Appeal, for the Ninth Circuit, affirming the Dismissal and/or Summary Judgment of the District Court of California,

was filed September 17, 1999 (Appendix C))

Jurisdiction of this Court is sought under 28 U.S.C. RULES, Rules 17, 19, 20 21, 22 and 23; Rice v. Sioux City Memorial Park Cemetery (1955) 349 U.S. 70; 28 U.S.C. 1331 (Federal question): 28 U.S.C. 1340 (Internal Revenue), 28 U.S.C. 1343 (Civil rights), 28 U.S.C. 13467 (United States as defendant), and the Fourth (unreasonable searches and seizures) and Fifth (denial of due process of law) Amendments to the United States Constitution, as well as 42 U.S.C. 1985, 42 U.S.C. 1986, 42 U.S.C. 1988, and 18 U.S.C. 241, and case authority of Bivens v. Six Unnamed...Agents, etc., 403 U.S. 388.

"A substantial controversy respecting rights under the Federal Constitution, presented by the averments of the bill, is sufficient to support the jurisdiction of a federal circuit court, irrespective of the actual sufficiency of the facts alleged to justify the relief sought, or of the facts as they may subsequently turn out."

Pacific Electric R. Co. v. Los Angeles, Cal. 1904, 24 S.Ct. 586, 104 U.S. 112

CONSTITUTIONAL PROVISIONS INVOLVED

Article III of the U.S. Constitution providing for Federal judiciary, the Fourth Amendment (prohibition against unreasonable searches and seizures) and the Fifth Amendment (prohibition against deprivation of ...property without due process of law)

STATEMENT OF THE CASE

I. Nature of the Action

Plaintiff brings his action "For damages and to Redress Wrongs" and sets forth his causes of action for

(1) Conspiracy to violate constitutional rights

(2) Deprivation of constitutional and civil rights

(3) Unlawful interference with, and termination of, business and professional occupation.

(4) Unlawful search and seizure of business premises, business operation and business assets; and

(5) For injunctive relief and temporary and

permanent restraining orders, filed December 12, 1997.

II. Summary of Material Facts

Plaintiff paid his federal income taxes, together with penalties and interest when late, in full, from approximately 1939 on, with the exception of 1942, his first year in military service. IRS agent MOHIUDDEN was assigned to Plaintiff's taxpayer's account in 1993. Thereafter, IRS began a series of levies against taxpayers properties, some unauthorized, some improperly obtained, and all unnecessary and unwarranted.

In time, IRS controlled plaintiff's economic life. IRS did not levy on plaintiff's property because he did not pay his taxes on time—plaintiff did not pay his taxes on time because of IRS's relentless, improper and unwarranted levies.

In the fall of 1995, taxpayer owed taxes and offered to pay his obligations in installments. Such offer was never accepted by IRS, although defendant MOHIUDDIN tacitly agreed to that arrangement. Plaintiff

received an unexpected substantial fee after a successful civil trial, and paid substantially all of his then federal tax obligations, in December, 1995.

Defendant IRS agent MOHIUDDIN then became quite angry with plaintiff because the payment was not made to her and ordered plaintiff to send all future tax returns and payments directly to her.

On May 22, 1996, plaintiff paid further taxes due and requested an accounting. On June 20, 1996, plaintiff paid all remaining taxes due except for the penalties and interest of the 1987 tax obligation, and again requested an accounting of taxes paid and fund collected by levy and otherwise, and offered to pay all delinquent interest and penalties upon receipt of such accounting. All correspondence was ignored, and MOHIUDDIN filed her declaration with the District Court in California to obtain an Order for entry into plaintiff's premises to seize plaintiff's property. That declaration was both false and fraudulent as hereafter defined.

On November 1, 1996, armed with that Order, a copy of which is attached hereto as Appendix A, MOHIUDDEN and other IRS agents entered taxpayer's premises in taxpayers absence, evicted taxpayer's staff and taxpayer's sub-tenant, changed the locks on the outer door, and placed a notice on the outer door that stated, in substance that plaintiff was out of business. Plaintiff attempted to regain his premises by appropriate motions to the District Court, which were denied on short argument on the bases of lack of subject matter jurisdiction.

Plaintiff regained his premises on December 2, 1996, by filing a Chapter 13 bankruptcy petition. He dismissed that Bankruptcy proceeding on January 1, 1997. Plaintiff lost his professional operation, his employees and staff, monies owed for successful litigation, in excess of $75,000.00, as well as other business and professional fees for services, over the next year, in excess of $75,000.00, as well as his resulting mental anguish and emotional distress.

Plaintiff filed his 1987 Income Tax Return in 1993, late, and requested a waiver of penalties on the grounds that he moved his office in 1987, had lost a substantial portion of his financial documents and records, did not believe that there would be taxes due (because of plaintiff's interpretation of changes in the law of taxing capital gains), and for other reasons.

Plaintiff paid his 1987 taxes, in full, in October, 1994, by Cashier's Check, and again requested a waiver of penalties, as well as a computation of interest due, which he agreed to pay upon receipt of computation. IRS took the money, but did not respond to either letter, and did not grant or deny the request for waiver of penalties, or even acknowledge the same.

In December 1995, IRS had begun a series of levies, against plaintiff's monthly Military Retirement in the amount of $239.00, and in February of 1996, against plaintiff's monthly Social Security benefits in the sum of $442.00, for a total of $681.00 per month.

By December 1995, plaintiff had paid most of taxes then due. On May 22, 1996, plaintiff paid further taxes then due. On or about June 20, 1996, plaintiff filed his tax returns and paid his last remaining tax obligations, in full, together with interest, and including a request that an overpayment be applied to penalties that may have accrued on his 1994 Income Tax Return. Plaintiff again requested an accounting of funds paid and interest accrued, so that he could pay the remaining interest and penalties, if any, except for the penalties still assessed, and still the subject of plaintiff's request for waiver, on his 1987 Income Tax. Both of such correspondence were ignored by IRS.

Other facts appear in the remaining sections of this brief.

III. Proceedings to Date

Plaintiff's lawsuit was subject to defendants MOHIUDDIN and others' Motion to Dismiss and for Summary Judgement that was granted by trial court

(Appendix B) hereto. Plaintiff appealed to the Ninth Circuit Court of Appeals, which affirmed the District Court's decision (Appendix C).

Plaintiff submits his petition for Writ of Certiorari to reverse the dismissal and Summary Judgment of this case, and to require the Court of Appeal for the Ninth Circuit to reverse the trial court's Dismissal of plaintiff's complaint and Summary Judgment for defendants.

IV. Federal Questions Raised In the Court of Appeal

The questions raised here were essentially raised in the Court of Appeals and included:

1. Course and scope of Federal agent's employment and determination of that issue by Summary Judgment certification.

2. Propriety of Dismissal of Federal Court action where Summons not returned in time provided by law.

3. The propriety of the District Court's determination that a Taxpayer is without a remedy to recover his damages suffered because of IRS agents'

unauthorized, unwarranted, and illegal acts, thereby denying plaintiff his constitutional rights to due process and freedom from unreasonable searches and seizures.

REASONS FOR ALLOWANCE OF WRIT

1. **THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, AND DISMISSAL OF PLAINTIFF'S ACTION, AND THE COURT OF APPEAL'S AFFIRMATION THEREOF, CONSTITUTED ERROR OF CONSTITUTIONAL MAGNITUDE, REQUIRING THIS COURT'S INTERVENTION TO PROTECT THE PLAINTIFF'S RIGHTS, AND THE RIGHTS OF OTHERS SIMILARLY SITUATED.**

> "The function of motion for summary judgment is not to permit the trial court to decide issues of fact but solely to determine whether there is issue of fact to be tried."

Byrnes v. Mutual Life Ins. Co. of N.Y.,

C.A.Ariz. 1955, 217 F.2d 497, certiorari

denied 75 S.Ct. 532, 348 U.S. 971

"All doubt as to existence of genuine issue of material fact must be resolved against moving party."

Insurance Co. of North America v.

Morrison, M.D.Fla.1993, 818 F.Supp. 1519

The dismissal of the Complaint, and the Summary Judgment entered, was predicated first upon the Distric t Court's determination that the individual defendant MOHIUDDEN was acting in the course and scope of her employment, based solely on the declaration/certification of Richard E. Drooyan, an acting U.S. Attorney, a non-percipient witness who expressed his opinion in that respect, under oath, "on the basis" of the information "then available to him". Such certification was without any knowledge of the facts involved. Pursuant thereto,

defendants obtained the dismissal of said defendant, "to the extent that the Complaint states a common law tort claim against her". Why all other defendants were dismissed is not stated.

It is well established that a Motion for Summary Judgment is not intended to be a substitute for trial of contested issues of fact, but rather, a determination of whether any such issues exist.

Defendants relied upon "Appendix to 28 CFR 15.3 (1990), 28 U.S.C. 2679(d)... as amended by Public Law 100-694". Insofar as such authority authorizes the resolution of the issues of law and fact as to the course and scope of employment of a Federal agent, to be determined by an opinion of a non-percipient witness, without any basis for such opinion, the same is unconstitutional, and a denial of due process of law to the plaintiff here, and all those similarly situated in the future.

Plaintiff is entitled to have the contested factual issues of this case, including whether or not defendant

MOHIUDDEN was acting in the course and scope of her employment as an IRS agent, by a trial on the merits of all such factual issues. As will be seen by the remainder of this brief, such factual issue will be shown to be likely resolved contrary to the opinion of Mr. Drooyan.

Defendant MOHIUDDEN was not acting in the course and scope of her employment when she obtained a court order to enter plaintiff's premises to seize his property, on the basis of known false and fraudulent statements, as hereinafter argued. The District Court further dismissed the case on the grounds that the Summons, with proof of service, had not been filed within the statutory time required by the rules and regulations pertaining thereto. Although plaintiff believed substituted service on defendant MOHIUDDEN by delivery of the Complaint and Summons to personnel designated as appropriate to receive process of service in the IRS Offices in Los Angeles, the dispute as to such service is moot in any event, because MOHIUDDEN made a general

appearance in this case to submit her Motions to Dismiss. She had, without doubt, received a copy of the documents involved, because she responded thereto by declaration in support of her Motions to Dismiss and for Summary Judgment.

> "When the reason for a rule ceases, so should the rule itself."
>
> California Civil Code, §3510

We submit the foregoing as the "law of the forum," (California), as no contrary Federal rule or regulation is found.

Plaintiff's counsel did not file the Summons with the proof of substituted service, or any proof at all, because he had yet to serve the unnamed IRS agents involved, and their named identity was not yet discovered, as plaintiff had no opportunity to take discovery. In any event, the Court had no authority to dismiss as to the other individual defendants, because of lack of return of the Summons showing service, as service could not possibly

be performed on them prior to Answer and discovery, as plaintiff was without knowledge of their true identities.

"The law respects form less than substance."

California Civil Code, §3528

"When the reason for a rule ceases, so should the rule itself."

California Civil Code, §3510

2. **PLAINTIFF/TAXPAYER WAS DEPRIVED OF HIS BUSINESS PREMISES, BUSINESS ASSETS, LAW OFFICE OPERATION, AND CLIENT FILES WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF HIS RIGHT TO BE FREE FROM UNNECESSARY SEARCHES AND SEIZURES, BY IRS AGENTS, REQUIRING THIS COURT'S INTERVENTION TO REDRESS THAT WRONG.**

"For every wrong there is a remedy."

California Civil Code, §3523

The District Court generally dismissed plaintiff's Complaint and/or granted Summary Judgment, primarily on the grounds that it had no subject-matter jurisdiction. The District Court stated that there is no right to recover for constitutional torts or common law torts in the Federal Courts, except as provided by the Federal Claims Tort Act.

Such findings are contra to this Court's majority opinion in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics 403 U.S. 388, 29 Lawyers Ed.2d 619. There, this Court held that the defendant's conduct was a violation of the Fourth Amendment's prohibition against unreasonable search and seizure. In Bivens, the federal agent was acting under color of federal authority, giving rise to a federal cause of action for damages, consequent upon the agents' unconstitutional conduct. (Bivens, supra.).

3. **THE DISTRICT COURT REJECTED TAXPAYER'S LAWSUIT TO RECOVER HIS**

DAMAGES FROM IRS AGENTS, SUFFERED AS A RESULT OF SUCH AGENTS' UNAUTHORIZED, UNWARRANTED, AND ILLEGAL ACTS IN DENIAL OF TAXPAYER'S CONSTITUTIONAL RIGHTS AND PRIVILEGES.

A.. Sovereign immunity does not always shield an IRS agent acting in the course and scope of his/her agency.

The District Court, in its Opinion, held that:

> "The Attorney General has certified that MOHIUDDEN was acting within the scope of her employment at the time of the incident out of which the claim arose. Thus MOHIUDDEN must be dismissed from the action and the United States must be substituted as the defendant. However, the FTCA shields the United States from suit. ... The Plaintiff is therefore left without a tort remedy, and the motion to dismiss the complaint to the extent it alleges common law tort

violations is GRANTED." APP., pg 8.

But this Court has held in Bivens, supra, that the plaintiff may have a cause of action for damages, where the Federal (IRS) agents' conduct is unconstitutional, i.e., result in a violation of plaintiff's constitutional rights, in that case, an unwarranted search of the plaintiff.

Here, defendants engaged in unwarranted, unauthorized, and illegal seizure of plaintiff's business premises, business assets, business and professional occupation, client's files, and all of plaintiff's business property, including property exempt from execution. Under Bivens, defendants' Motion should have been denied, as applied to "Common Law Tort Claim" violations, where the Common Law Tort violations also constitute unconstitutional and criminal conduct of the agent.

MOHUDDIN's declaration, repeated, in part, in the District Court's Opinion, that approximately $9,605.20 was owing on plaintiff's 1987 Income Tax obligation, was

blatantly false, and her declaration was further fraudulent in that they concealed material facts in obtaining the Order, namely, that IRS was receiving $681.00 each month in levies against plaintiff's monthly Social Security benefit and Military Retirement pension, and by the time she would enter the premises on November 1, 1996, and changed the locks on the door and put plaintiff out of business, IRS had already collected over $7,288.00 by such levies. Nothing was owed or due on the 1987 Tax whatsoever. The tax had been paid in full by cashier's check, in the sum of $11,299.66, which was never credited to that account. IRS added a small amount to the principal tax of approximately $1,200.00. After payment of taxes, there was some $6,000.00 claimed as penalties, plus interest on tax and penalties.

The penalties were not then due, as the request for waiver of penalties had not been addressed by IRS, and was not addressed, until they were finally denied in April, 1997, three and one-half years after waiver was first

requested, in violation of IRS' own rules and regulations. The remaining obligation, interest, would be somewhat less than $6,000.00, computed from April of 1988 to the time paid in 1994, and would have been paid in full from the $7,288.00 collected by levy, which would have resolved the 1987 obligation then due in its entirety, except for the disputed penalties.

MOHIUDDEN would further make her declaration, under oath, to the effect that there was no reasonable expectation to collect the balance due without the seizure of plaintiff's property, when she knew, although she did not disclose, that the levies at the rate of $682.00 per month, would have even extinguished the penalties and 1989 tax obligation within one year.

B. The Defendants' Acts Here Were Unnecessary, Unwarranted and Unconstitutional.

"Owners claim for damages arising out of alleged unconstitutional forfeiture of aircraft seized by Federal Aviation Administration safety regulations, so

characterized, came within subsection (a) of this section's grant of jurisdiction to hear cases 'found *** upon the constitution."

U.S. v. Lockheed L-188 Aircraft,

C.A.Or.1979, 656 F.2d 390; 28 U.S.C.

§1346

It is submitted to this Court that an IRS agent cannot be acting in the course and scope of their employment where they obtain an order for entry by false and fraudulent oath, under circumstances where they know that no taxes will be collected, and where they exceed the authority of the Order so wrongfully obtained.

Sovereign immunity should not apply when, as here, the agents' acts are not intended to, and do not, collect any taxes, are obtained through false oaths (perjury) and are not specifically authorized, and decrease future IRS revenue, being revenue that plaintiff would have paid as taxes, had he been permitted to continue his law practice.

The District Court asserts its lack of subject matter jurisdiction. But this case seems to parallel U.S. v. Lockheed, supra. Here, as there, plaintiff's property was wrongfully seized under an illegally obtained Order for Levy, which Order was exceeded as it did not authorize the seizure of plaintiff's business premises, business assets and the termination of plaintiff's business.

It should be noted that the property seized, plaintiff's law office furniture, fixtures, supplies, computers, and equipment, were appraised at less than $1,100.00, with a low bid projected at $900.00 – and such property after exemption for tools of the trade, would not have equaled the cost of cartage.

4. **THE DISTRICT COURT'S DECISION AFFIRMED BY THE COURT OF APPEAL, LEFT THE TAXPAYER WITHOUT A REMEDY TO RECOVER HIS DAMAGES SUFFERED BECAUSE OF IRS AGENTS' WRONGFUL ACTS AND**

CONDUCT.

"For every wrong, there is a remedy."

California Civil Code, §3523

So said President Kennedy in his message to Congress on Civil Rights. "(the) venerable Code of Equity Law, commends 'for every wrong, a remedy'" (H.R. Doc. No. 124, 88th Congress, First Session, 1963).

It is well settled that where legal rights have been invaded, "Federal Courts may use any available remedy to make good the wrong done." Bell v. Hood 327 U.S. 678, at 684 (1946); See also, Sullivan v. Little Huntington Park, 396 U.S. 229, at 238-240).

This case differs from Bivens as to several material aspects of the case. In the first instance, the defendants' conduct in Bivens constituted an unreasonable search of the plaintiff, certainly invading his right of privacy, as well as his right to be free from unreasonable search, as guaranteed by the Fourth Amendment to the Constitution. But in this case, the defendant IRS agents'

acts were not mere tortious, but criminal, and should therefore be considered as a wrong, not within the limitations of the Common Torts Claim Act., although certainly within the purview of that Act, because the crime in this case gave rise to the tort, and defendants' acts (lock-out) were not even authorized by the Order for Entry (Appendix A).

Plaintiff suggests that defendants' conduct was more within the specific mandate of Bell v. Hood, supra, that references a cause of action for damages because of "unconstitutional conduct", and does not appear to limit its rulings to mere tortious conduct, nor the limitations of the Federal Tort Claim Act. In any event, the wrong here, and the resulting and consequential damages, far exceed the damages suffered by Mr. Bivens, who was subject to a humiliating search of his person, and suffered mental anguish and emotional distress. But the next day, Mr. Bivens could go on with his life, uninterrupted, to whatever rewards it could hold for him. In the instant

case, plaintiff was subject to the seizure or taking of his property, tangible and intangible, because of the criminal act of the IRS agent involved (false and fraudulent statement, under oath, to obtain Order for Entry), as well as a violation of the Order obtained by such illegal means, as that Order did not authorize a lock-out, or even a seizure of plaintiff's premises, nor the deprivation of the plaintiff's business and professional occupation, with grievous damages that continue to this day, not to mention his mental anguish and emotional distress.

CONCLUSION

We submit to this Court that IRS agent/officers may not have absolute power to take a Taxpayer's profession, business, business premises, business operation, and livelihood.

That such power should be limited and restricted to cases of intentional tax evasions, and only after appropriate Court proceedings (Due Process), and that IRS

agents should have personal responsibility for their intentional, wrongful acts.

Plaintiff also argues that sovereign immunity may not extend to acts of an IRS agent done outside the course and scope of his/her employment, and such issue, when contested, should not be decided by certification in a Summary Judgment proceeding.

Further, sovereign immunity should not extend to unauthorized, unwarranted, unconstitutional acts of an Internal Revenue Agent.

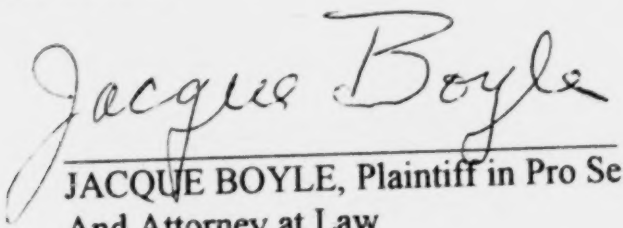
Finally, remedy must always exist for a taxpayer who suffered damages from illegal acts of Internal Revenue Service Agents/officers who seize a taxpayer's profession, business, business premises, law office operation, and livelihood, by unwarranted, unauthorized , and unlawful levy illegally obtained, as here.

Plaintiff requests this Honorable Court's intervention to establish and re-establish these principles,

//

for the protection of plaintiff's, and every individual's, constitutional rights, privileges and immunities herein addressed.

DATED: December 16, 1999



JACQUE BOYLE, Plaintiff in Pro Se
And Attorney at Law

APPENDIX "A"

APPENDIX A

NORA M. MANELLA
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FILED
Clerk, U.S. District Court
OCT -9 1996

Entered
OCT 10 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

IN THE MATTER OF THE TAX INDEBTEDNESS OF JACQUE BOYLE, DBA, JACQUE BOYLE, ATTORNEY AT LAW	NO. CV 9667 JGD ORDER FOR ENTRY ON PREMISES TO EFFECT LEVY

The Court has reviewed the Application of Internal Revenue Service to Enter premises to Effect Levy and Declaration in Support Thereof, as well as all other papers filed in connection with

this matter.

The Declaration of Fatema MOHIUDDIN, a revenue officer of the Internal Revenue Service, states that Jacque Boyle, dba, Jacque Boyle, Attorney at Law, is a taxpayer with an outstanding assessed federal tax liability of $9,605.20 plus statutory additions. Declaration of Fatema MOHIUDDIN ("MOHIUDDIN Decl.") at Para. 6. The Internal Revenue Service has sent notices and demands to the taxpayer, but the taxpayer has neglected or refused to pay the taxes owed. MOHIUDDIN Decl., Paras. 2, 4, and 5. On May 15, 1996, while at the taxpayer's business premises located at 201 North Figueroa Street, Suite 1425, Los Angeles, California, Ms. MOHIUDDIN observed property including, but not limited to, bookshelves, bookcases, sofas, credenzas, file cabinet, desks,

chairs, typewriter, copy machine, fax machine, display writer, law books and manuals, and miscellaneous office accessories. MOHIUDDIN Decl., Para 3. Ms. MOHIUDDIN has been unable to verify that the taxpayer owns the aforementioned property. *Id.* However, Ms. MOHIUDDIN states that the taxpayer is currently practicing law as a sole practitioner and that Chip Williams, property manager, stated that the taxpayer leases the space unfurnished. Id. Based on these facts, Ms. MOHIUDDIN states that she has reason to believe the taxpayer is the owner of the above assets. ID. Additionally, the Revenue Officer has stated that it is believed and anticipated that property such as cash, checks, credit card slips/drafts, and accounts receivables will be on the premises. ID.

Based on the foregoing, this court hereby finds that probable cause exists to believe that the property described above and other items of a similar nature, can be found at the listed address and that such property is subject to seizure pursuant to 26 U.S.C. Section 6331 because it has a sufficient nexus with the taxpayer. Flores v. United States 551 F.2d 1169 (9th Cir. 1977). See also United States v. Condo, 782 F.2d 1502 (9th Cir. 1986); In the Matter of the Tax Indebtedness of Gerwig, 461 F.Supp. 449 (C.D. Cal. 1978); In the Matter of the Tax Indebtedness of Subblefield, 810 F.Supp. 277 (E.D. Cal. 1992).

IT IS ORDERED as follows:

1. That Fatema MOHIUDDIN, and/or any other properly designated agent of the Internal Revenue Service, be authorized to

enter the above-described business premises in or to search for, levy upon, and seize the property described above and all property of a similar nature. The Internal Revenue Service may also seize any and all property and rights to property (except such property as is exempt under 26 U.S.C. Section 6334) belonging to Jacque Boyle, dba, Jacque Boyle, Attorney at Law, which is in plain view during the course of the above-described search and seizure.

2. That in making this seizure, the revenue officer(s) shall enter only the business premises located at 201 North Figueroa Street, Suite 1425, Los Angeles, California, and only during daylight business hours, and do so within twenty-eight (28) days of the date of this order, or entry thereof.

3. That in making this seizure, the revenue officer(s) shall neither search through nor seize the private papers belonging to the taxpayer.

4. That in making this seizure the revenue officer(s) shall not seize the client legal files of the taxpayer, his employees or his clients, nor shall the revenue officer(s) cause said files to be beyond the reach of the taxpayer or his employees at any time.

5. That such officer(s) shall make a detailed inventory as to the property seized, leaving a copy thereof at the premises, as well as personally serving a copy on the taxpayer, or, if unavailable at the premises, leaving a copy at the above address. The inventory is to provide the name of any Internal Revenue Service representative involved in the seizure, along with an address and

telephone number where the representative can be contacted by the taxpayer.

6. That such officer(s) shall serve a copy of this Order on the taxpayer by leaving a copy at the premises, as well as personally serving a copy on the taxpayer or, if unavailable at the premises, leaving a copy at the above address.

7. That such officer(s) shall return to the Court for further aid and directions if any physical resistance either occurs or is likely to occur at the time or point of entry upon or into the premises.

DATED this ___ day of Oct -8 1996 , 1996

JOHN G. DAVIES
United States District Judge
UNITED STATES DISTRICT JUDGE

PRESENTED BY:
NORA M. MANELLA, United States Attorney
EDWARD M. ROBBINS, JR.
Assistant United States Attorney
Chief, Tax Division
/s/ Sandra R. Brown

SANDRA R. BROWN
Assistant United States Attorney

APPENDIX B

APPENDIX B

JACQUE BOYLE / BAR #20912
Attorney at Law
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445 S. Figueroa Street
Los Angeles, CA 90071

Telephone: (213) 622-7116

Attorney Pro Se

FILED
JUL 15 1998
Cathy A. Catterson
Clerk,
U.S. Court of Appeals

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JACQUE BOYLE, Plaintiff, v. INTERNAL REVENUE SERVICE, et al., Defendants.	) CASE NO. CV 97-9213 JGD (JGx))) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND ACTION, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

On June 29, 1998, the Defendant's Motion to Dismiss Plaintiff's Complaint and Action, or Alternatively, for Summary Judgment came on for hearing. The Court, having considered the written submissions

of the parties and the oral argument of counsel, hereby GRANTS the motion for the following reasons.

Background

On December 12, 1997, Jacque Boyle, proceeding pro-se, filed a complaint in federal court. The Defendants are the Internal Revenue Service; Margaret Richardson, the former Commissioner of the IRS; Janet Brown; Fatema Mohiudden; and twelve unnamed IRS agents. The Plaintiff claims the Defendants conspired to violate his civil and constitution rights by levying in his bank accounts, military retirement pension, and social security benefits and by seizing his law practice in November 1996. The Defendants move to dismiss or, in the alternative, for summary judgment.

Facts

The Plaintiff is a 77-year-old attorney. Mohuiddin is an IRS revenue officer. On or about May 10, 1993, Mohuiddin was assigned to collect unpaid tax liabilities incurred by the Plaintiff.

On October 30, 1993, the Plaintiff submitted a 1040 tax return for the tax period ending December 31, 1987. In a letter submitted with the tax return, Boyle requested that any penalties that may have accrued be waived. Boyle claimed a waiver was appropriate because he moved his law office in 1987 and lost many documents and records required for the return. (Pl.'s Opp'n, Ex. G.) The IRS processed the return on December 6, 1987, and assessed taxes in the amount of $11,405.58. On the same date, the IRS assessed a $2285.01 late filing penalty, a

$2538.89 penalty for the late payment of tax, and $8842.72 in interest. (Mot., Ex. 103.) The IRS failed to respond to the request for waiver of penalties.

Mohiuddin made several unsuccessful attempts to convince Boyle to enter into an agreement to repay the liabilities. On April 22, 1994, after said attempts failed, Mohuiddin filed notices of federal tax liens with the Los Angeles County Recorder in the amount of $22,467.74.[1] On or about October 8, 1994, Boyle paid the IRS $11,299.00--the amount he claimed was due on the 1987 tax return. In addition, Boyle submitted a letter repeating the request for waiver of statutory penalties. (Pl.'s Opp'n, Ex.I.)

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[1] The lien included assessments for both the tax period ending December 31, 1987 and the tax period ending December 31, 1989. The unpaid balance on the latter assessment was $645.54.

On or about February 13, 1995, Mohuiddin served notices of levy upon Boyle's military retirement pension and social security benefits. The levies were not continuous in nature and required Mohuiddin to prepare separate notices of levy each month on each source of levied funds. The amounts collected on said levies were $239.25 and $422.80 per month.

By May 1996, Mohuiddin determined that, because the amounts collected from the levies were less than the accruals of interest and penalties on the liabilities, further enforcement action was necessary. On May 15, 1996, she made a field call to Boyle's business address, 201 North Figueroa Street, Suite 1425. Los Angeles, California. During the visit, Mohuiddin observed property at the business premises, including furniture, office equipment, a computer, copy and facsimile

machines, and law books, all of which apparently belonged to the Plaintiff. (Mohuiddin Decl.¶ 7.) At the conclusion of the visit, Mohuiddin left a written request for Boyle to grant the IRS consent to enter the business premises in order to effect levy on the property located therein. Boyle failed to give consent. (Mohuiddin Decl. ¶ 7.)

On October 3, 1996, the IRS filed an Application of Internal Revenue Service to Enter Premises to Effect Levy in this Court. In support thereof, Mohuiddin executed a declaration stating:

From my personal examination of the Internal Revenue Service Collection File with respect to Jacque Boyle... I have ascertained that assessment of federal income taxes have been for the following periods, in the following amounts, and that notices and demands thereof were made

to the taxpayer on the dates indicated:

Period Ending	Original Amount of Assessment	Date of Notice and Demand
December 31, 1987	$23,822.20	December 6, 1993
December 31, 1991	$2,137.37	September 26, 1994

> On May 15, 1996, while at the taxpayer's business premises... I observed [the aforementioned property].
>
> . . . .
>
> The taxpayer's neglect or refusal to pay the aforementioned outstanding federal tax liabilities in full has continued to the date of this declaration, and there is now due and owing with respect thereto, a total of $9,605.20 plus statutory additions.

(Opp'n, Ex. CC at 89-91.)

On or about October 10, 1996, the Court granted the application, and an Order for Entry of Premises to Effect Levy was entered. The order states:

> That Fatema Mohuiddin, and/or any other properly desingated agent of the Internal Revenue Serice, be authorized to enter the above-described premises . . . The [IRS] may also seize any and all property and rights to property (except such property as is exempt under 26 U.S. C. Section 6334) belonging to Jacque

Boyle . . . which is in plain view during the course of the above-described search and seizure.

. . . .

> That in making this seizure the revenue officer (s) shall not seize the client legal files of the taxpayer, his employees or his clients, nor shall the revenue officer (s) cause said files to be place [d} beyond the reach of the taxpayer or his employees at any time.

(Opp'n, Ex.1 at 36-37.)

On November 1, 1996, Mohuiddin and other agents entered the business premises and levied upon property therein. On the same date, Mohuiddin seized Boyle's leasehold interest or rental rights in the subject property, allegedly pursuant to 26 U.S. C. § 6331. The complaint alleges that Mohuiddin and others reviewed and read the client files in contravention of the October 10, 1996 order. (Compli. ¶ 30.) The complaint further alleges that

the IRS changed the locks on the property and therefore denied the Plaintiff access to the client files, except for one hour on two occasions. (Compl.¶ 10 (H).)

On November 14, 1996, Boyle filed a Taxpayer's Application for Order Restoring Premises and Termination of Lock-Out; Petition for Injunction; and Motion for Sanctions. By order entered November 21, 1996, the Court denied the application.

On November 16, 1996, the IRS advertised the public auction of certain property found at the business premises. The auction was scheduled for December 3, 1996.

On or about December 2, 1996, Boyle filed a Chapter 13 bankruptcy petition with the United States Bankruptcy Court. Mohuiddin then canceled the public auction. The complaint alleges that Mohuiddin told certain members of the

public that the Plaintiff "was out of business" and that the IRS "put [him] out of business because of unlawful, wilful refusal to pay his taxes." (Compli. ¶ 31.)

On December 3, 1996, Mohuiddin ended the seizure of the property located at 201 North Figueroa Street and released the levy that had been served on the business property of the Plaintiff. (Mohuiddin Decl. ¶ 20.) The complaint alleges that the IRS continued to levy upon the Plaintiff's social security and military retirement benefits in December 1996, in violation of the bankruptcy laws. (Compl. ¶ 10 (I).).[2]

On January 6, 1997, the bankruptcy court dismissed Chapter 13 petition.

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[2] The Defendants presented evidence to the contrary. (Mohuiddin Decl. ¶ 21.)

Thereafter, the IRS continued top levy against the retirement benefits of the Plaintiff. (Compl. ¶ 11;Mot., Ex. 103.) Between January 1997 and February 1998, the Plaintiff paid $239.25 to the IRS approximately every month. As of February 9, 1998, the Plaintiff owes $10,226.14 to the IRS. (Mot., Ex. 103.)

Procedural History

This action was filed on December 12, 1997. The complaint alleges that, from December 1995 to February 1, 1997, the Defendants levied against the social security benefits of the Plaintiff and wrongfully seized $6600. (Compli. ¶ 10 (B).) From Febraury 1996 to date, the Defendants levied against the military retirements funds of the Plaintiff and illegally seized $5200. (Compli. ¶ 10 (C).) In addition, the Defendants have failed to credit the payment by the

Plaintiff of income tax liabilities for the year 1987 and have failed to waive statutory penalties. Compli. ¶ 10 (E).) Lastly, the Defendants obtained the court order to seize the law office of the Plaintiff, changed the locks on the doors, withheld business records and other property, evicted a sub-tenant, and forced the Plaintiff to file the Chapter 13 bankruptcy petition to recover the property. (Compli. ¶¶ 10 (G-H).)

Based on these allegation, the Plaintiff asserts claims entitled (1) conspiracy to violate and violation of constitutional protections, (2) deprivation of constitutional rights, (3) unlawful interference with and termination of business and professional occupation, (4) unlawful search and seizure of business premises, and (5) injunctive relief. The Plaintiff seeks $15,000 in

damages for money wrongfully seized, $150,000 for the loss caused during the one-month period the law office was under seizure, and $10 million for the loss of employees and the disruption of the law practice. The Plaintiff also seeks an injunction barring the Defendants from levying upon assets owned by the Plaintiff and "prohibiting the operation of the Internal Revenue Service under the Internal Revenue Code." (Compl. At 23.)

The plaintiff failed to serve a copy of the summons and complaint on the Attorney General. (Mot., Ex 101.) There is no evidence that the plaintiff has served the individual Defendants. There is no employee named Janet Brown in the Los Angeles Internal Revenue District, and the Government claims in the opposition that she is a fictitious person.

On April 8, 1998, the instant motion

was filed. The Government filed concurrently a Certification of Richard E. Drooyan of Course and Scope of Employment as to Individual Federal Defendant Fatema Mohuiddin. Therein, Drooyan certifies that Mohuiddin acted within the course and scope of her employment at all times materials to the incidents alleged in the complaint.

The plaintiff failed to file a timely opposition. The motion came on for hearing on June 8, 1998. The plaintiff appeared at the hearing, and the Court ordered him to file and serve an opposition by 12:00 p.m. on June 19, 1998. The Plaintiff filed an opposition on said date, but failed to serve the Government until 5:02 p.m. Moreover, the opposition fails to meaningfully respond to the Government's motion or cite a single statute or case in support of the

contentions therein.

Discussion

A. Standard

"A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.

Hall v. City of Santa Barbara, 833 F.2d 1270, 1274 n.9 (9th Cir. 1986). Further, "it is axiomatic that the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely

granted. Id.

In considering a Rule 12 (b)(6) motion, the rule itself states that if matters outside the pleadings are presented and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986). Further, it is reversible error for a court to grant a motion to dismiss that has been converted to one for summary judgment, without Providing all parties a reasonable opportunity to present material relevant to a Rule 56 motion. Id.
Nonetheless, a court considering a motion to dismiss may take judicial notice of facts outside of the pleadings, including records and reports of administrative bodies. Id., Also, a copy of a written

instrument attached to a pleading as an exhibit is a part of that pleading and may properly be considered for purposes of a motion pursuant to Rule 12(b) (6). See Hal Roach studios v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).

B. Claims Against the IRS

It is well established that the IRS cannot be sued in federal court and that the proper party in actions involving federal taxes is the United States. See Blackmar v. Guerre, 342 U.S. 512, 514, 72 S. Ct. 410 (1952). Furthermore, agencies of the United States cannot be sued eo nominee unless such suits are specifically authorized by Congress. Id. at 515. "It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued." Gilbert v. DaGrossa, 756 F.2d 1455, 1457

(9th Cir. 1985). The waiver must be unequivocally expressed. Id. Absent consent to sue, dismissal of the action is required. Hutchinson v. United States, 677 F.2d 1322, 1327 (9th Cir. 1982).

No waiver of sovereign immunity is provided by the Constitution. See Pereira v. U.S. Postal Serv., 964 F.2d 873, 876 (9th Cir. 1992) ("[F]ederal district courts have no jurisdiction over the United States where claims allege constitutional torts."); Clemente v. United States, 766 F.2d 1358 (9th Cir. 1985) (absent express waiver of sovereign immunity, neither the United States nor the Air Force could be held liable for constitutional torts of federal officers). The federal statutes cited in the complaint-28 U.S.C. SS 1331, 1340, and 1346--do not constitute a waiver of sovereign immunity. Section 1331 is the

general grant of federal question jurisdiction and does not constitute a waiver of sovereign immunity. 9ge FDIC v. Meyer, 510 U.S. 471, 483-86, 114 S. Ct. 996, 1004-06 (1994); Bivens v. six Unknown Named Agents of the Fed, Bureau of Narcotics, 403 U.S. 388, 389-90, 91 S. Ct. 1999, 2001-02 (1971) (implying damages remedy against individual officers in part because of the lack of remedy against the Government). Section 1346 confers the district courts with jurisdiction over tax refund suits. However, there is no allegation the Plaintiff has satisfied the jurisdictional prerequisites to suit under § 1346, namely that the full amount of the tax has been paid and that a timely administrative claim has been filed and denied. Finally, § 1340, which states that "district courts shall have original jurisdiction of any civil action arising

under any Act of Congress providing f or internal revenue," has not been interpreted as a waiver of sovereign immunity. See State Marine Lines, Inc. v. Shultz, 359 F. Supp. 512, 514-15 (D.S.C. 1973), vacated on other grounds, 498 F.2d 1146 (4th Cir. 1974).

The complaint fails to allege or point to a waiver of sovereign immunity by the IRS or United States that would permit suit against the IRS or United States. Thus, the Court is without subject matter jurisdiction, and the motion to dismiss the claims against the IRS or United States must be GRANTED.

C. Claim for Injunctive Relief

Section 7421 of Title 26 states that no person may maintain a "suit for the purpose of restraining the assessment or collection of any tax." 26 U.S. C. S 7421 (a). The provision precludes federal

Courts from enjoining the IRS or its officers unless (1) it is clear that under no circumstances could the government ultimately prevail, and (2) equity jurisdiction is otherwise present. Sam Enochs v. Williams Packing Co., 370 U.S. 1, 82 S. Ct. 1105 (1962).

The Plaintiff seeks to enjoin the IRS from levying on his bank accounts and to restrain the enforcement of the Internal Revenue Code. The claim for injunctive relief lacks merit and borders on frivolousness. The motion to dismiss said claim is therefore GRANTED.

D. Tort Claims Against the Individual Defendants

The complaint alleges a claim for unlawful interference against the

individual Defendants[3] . Tort claims against federal employees are limited by the Federal Tort Claims Act ("FTCA") , 28 U.S.C. SS 2671-2680. The FTCA is the exclusive remedy for torts committed by federal employees within the course of their employment. This is so even if the FTCA itself precludes government liability. See United States v. Smith, 499 U.S. 160, 111 S. Ct. 1180 (1991). If a federal employee is sued individually, the FTCA empowers the Attorney General to certify that the employee was acting

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[3] In the opposition, the Plaintiff writes under the heading "Federal Tort Claims Act": "While much of defendants' conduct is tortious, the basis of plaintiff's Complaint is the unlawful, unconstitutional conduct of the IRS and its agents, and for return of property, or its value, taken by the IRS." It is unclear from this statement whether the Plaintiff has abandoned any claims under the FTCA. The Court will assume he has not and address them.

within the scope of his employment at the time of the incident out of which the claim arose. Upon certification, the employee is dismissed from the action and the United States is substituted as the defendant. The case then falls under the governance of the FTCA. If, however, the FTCA shields the United States from suit, see, e.g., 28 U.S.C. 2860(c) (excluding from the waiver of sovereign immunity liability for claims "arising in respect of the assessment or collection of any tax"), the plaintiff may be left without a tort action against any party. See Smith, 499 U.S. at 162, 111 S. Ct. at 1183; see also Gutierrez de Martinez v. Lamagno, 515 U.S. 417, 420, 115 S. Ct. 2227, 2229 (1995).

In this action, the Attorney General has certified that Mohiuddin was acting within the scope of her employment at the

time of the incident out of which the claim arose. Thus, Mohiuddin must be dismissed from the action and the United States must be substituted as the defendant. However, the FTCA shields the United States from suit. See 28 U.S.C. S 2860(c). The Plaintiff is therefore left without a tort remedy, and the motion to dismiss the complaint to the extent it alleges common law tort violations is GRANTED.

E. The Claim for Violation of 42 U.S.C. S 1983

The complaint purports to state a claim for violation of 42 U.S.C. S 1983. (Compl. ¶ 8.) Section 1983 applies only to persons acting under color of state (not federal) law, and thus the complaint fails to state a claim for violation of said statute. See Billings v. United States, 57 F.3d 757 (9th Cir. 1995). Thus, the motion

to dismiss the complaint to the extent it is based on § 1983 is GRANTED.

F. The Bivens Claim and the Claim for Violation of 42 U.S.C. § 1985(3)

The Plaintiff claims the Defendants violated and conspired to violate the Fifth Amendment guarantee of due process and the Fourth Amendment prohibition on unreasonable searches and seizures.

In certain circumstances, a plaintiff may bring an action for damages against federal officials in their individual capacities for constitutional violations. See Davis v. Passman, 442 U.S. 228, 99 S. Ct. 2264 (1979); Bivens, 403 U.S. at 388, 91 S. Ct. at 1999. However, the Ninth Circuit has held that a plaintiff may not maintain a Bivens claim arising from the improper collection of taxes because there is no constitutional violation. See Wages v. IRS, 915 F.2d 1230, 1235 (9th Cir.

1990) (dismissing claim for damages alleging IRS agents improperly audited and levied assets in violation of Fourth and Fifth Amendment); see also Cameron v. IRS, 773 F.2d 126, 129 (7th Cir. 1985). The Ninth Circuit has concluded that the remedies provided by Congress, particularly the right to file an action against the government for a refund of taxes improperly collected, forecloses a damages action under Bivens. See Wages, 915 F.2d at 1235; See also 26 U.S.C. §§ 6213, 7422(a); cf. G.M.Leasing Corp. v. United States, 429 U.S. 338, 97 S. Ct. 619 (1977) (holding that a judicial warrant is necessary to effect tax levies on the private premises of a taxpayer and suggesting that a Bivens remedy may be available for an aggrieved taxpayer).

The Court, however, need not decide at the this time whether the Plaintiff may

be able to allege a viable claim under Bivens or § 1985(3) because the Plaintiff has failed to serve the individual Defendants.

Rule 4(i) governs the service of process upon the United States, its agencies, and its officers. The rule states:

> (i) Service Upon the United States, and Its Agencies, Corporations, or Officers.
> (1) Service upon the United States shall be effected
> (A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and
> (B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia,

and

> (C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.
> (2) Service upon an officer, agency, or corporation of the United States, shall be effected by serving the United States in the manner prescribed by paragraph (1) of this subdivision and by also sending a copy of the summons and of the complaint by registered or certified mail to the officer, agency, or corporation.
> (3) The court shall allow a reasonable time for service of process under this subdivision for the purpose of curing the failure to serve multiple officers, agencies, or corporations of the United States if the plaintiff has effected service on either the United States attorney or the Attorney General of the United States.

Fed. R. Civ. P. 4(i). However, when money damages are sought through a Bivens claim, personal service under Rule 4(e) is necessary to obtain jurisdiction over the defendant in her individual capacity. See Johnston v. Horne, 875 F.2d 1415, 1424

(9th Cir. 1989); Daly-Murphy v. Winston, 820 F.2d 1470 (9th Cir. 1987). Rule 4(e) provides:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
> (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or
> (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by-law to receive service of process.

Fed. R. Civ. P. 4(e). Rule 4(m) governs the timing for service of process and states:

> If service of the summons and complaint is not made upon a

> defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Fed. R. Civ. P. 4(m). A dismissal under Rule 4(m) is without prejudice. Lee Powell v. Starwalt, 866 F.2d 964, 966 (7th Cir. 1989).

The Plaintiff has failed to properly serve the individual Defendants in conformance with Rule 4(e). There is no evidence that the individual Defendants have been served personally or pursuant to California law. No proofs of service have been filed. Mohiuddin declared that she has not been served personally or by another method. (Mohiuddin Decl. ¶ 23.) Thus, to the extent the individual Defendants are sued in their individual

capacities under Bivens and under federal statutes, they have not been properly served.[4]

Rule 4(m) states that the time limit for service of the summons and complaint is 120 days. This time period expired on April 12, 1998. The Plaintiff has presented no evidence of good cause for the failure to serve and has failed to provide any reason to extend the time

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4 There is no evidence that the Plaintiff has sent a copy of the summons and complaint to the Attorney General of the United States. Thus, to the extent the individual Defendants are sued in their official capacities, they have not been properly served. Moreover, any action against the individual Defendants in their official capacities is a suit against the United States and thus fails to state a claim upon which relief may be granted. See DaGrossa, 757 F.3d at 1457.

period for service.[5] This motion was filed on April 8, 1998 and came on for hearing on June 29, 1998. During this period, the Plaintiff had ample time to attempt service of the individual Defendants or articulate reasons why service was not feasible. The Plaintiff failed to do so. In sum, the Court finds that no good cause exists to extend the time period for service and that this is not an appropriate case for the Court to exercise any discretion it may have to extend the period. Thus, the motion to dismiss the complaint against the

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[5] During the June 29, 1998 hearing, the Plaintiff argued that he was somehow misled by agents of the IRS into thinking that service upon the IRS was sufficient to effect service upon the individual Defendants. This vague allegation was not raised in the opposition and is insufficient to constitute good cause to extended the time period for service.

individual Defendants is GRANTED.

Conclusion

The action is dismissed. This dismissal is without prejudice to any Bivens claim by the Plaintiff against the individual Defendants and the claim for violation of 42 U.S.C. § 1985(3). The dismissal is with prejudice as to the claims against the IRS or the United States, the claim for violation of 42 U.S.C. S 1983, and the claims against the individual Defendants or United States for common law tort violations. The claim for injunctive relief is also dismissed with prejudice.

IT IS SO ORDERED.

Dated: JUL 15 1998

s/ John G. Davies

JOHN G. DAVIES
United States District Judge

APPENDIX C

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Clerk, U.S. Court of Appeals

FILED
SEP 17 1999
CATHY A. CATTERSON

JACQUE BOYLE,

No. 98-56563

Plaintiff-Appellant,

D.C. No.
CV-97-09213-JGD

v.

MEMORANDUM[1]

INTERNAL REVENUE SERVICE, an entity of the United States Government; MARGARET RICHARDSON, Director, Internal Revenue Service; JANET BROWN; FATEMA MOHUIDDIN; TWELVE UNNAMED INTERNAL REVENUE SERVICE AGENTS,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Submitted September 13, 1999[2]

Before: FERNANDEZ, TASHIMA, and GRABER, Circuit Judges.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

[2] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, Boyle's request for oral argument is denied

Jacque Boyle appeals pro se the district court's dismissal of his action challenging tax levies and seizure of property from his law office. We have jurisdiction pursuant to 28 U. S.C. § 1291. We review de novo the district court's dismissal, *see Gasho v. United States*, 39 F.3d 1420, 1436 (9th Cir. 1994), and we affirm.

Insofar as Boyle attempted to sue the Internal Revenue Service itself and IRS employees in their official capacities, we conclude that the district court did not err by dismissing claims against these defendants based on the United States' sovereign immunity. *See Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 484-86 (1994) (*Bivens* claim will not lie against federal agency); *Blackmar v. Guerre*, 342 U.S. 512, 515-16 (1952) (suit against an agency is a suit against the United States); *Gilbert v. DaGrossa*, 756

F.2d 1455, 1458-59 (9th Cir. 1985) (28 U.S.C. § 1331 not a waiver of immunity); *Hutchinson v. United States*, 677 F.2d 1322, 1327 (9th Cir. 1982) (Federal Tort Claims Act not a waiver of immunity where no administrative claim filed and where challenging discretionary acts relating to collection of taxes).

We also conclude that the district court did not err by dismissing Boyle's claims for injunctive relief. *See* 26 U.S.C. § 7421.

Insofar as Boyle attempted to sue IRS employees in their individual capacities, we conclude that the district court did not err by dismissing the action against these defendants for failure to effect service in a timely fashion. *See* Fed. R. Civ. P. 4(i); *Daly-Murphy v. Winston*, 820 F.2d 1470, 1478 (9th Cir. 1987); *Hutchison*, 677 F.2d at 1328.

AFFIRMED.

CERTIFICATE OF SERVICE BY MAIL

LILLIE L. VALENCIA, declares and states:

That I am a paralegal and performed services for the Petitioner herein, Jacque Boyle, an Attorney at Law appearing in Pro Se in this action, and who is a member of the Bar of the Supreme Court of the United States. That I am not a party to the within action, and my business address is 445 So. Figueroa Street., Suite 2350, Los Angeles, CA 90071. On December 16, 1999, pursuant to United States Supreme Court Rules, I served the within PETITION FOR WRIT OF CERTIORARI, on all parties involved in said action, by placing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States Mail at Los Angeles, California, addressed as follows:

OFFICE OF THE CLERK OF THE UNITED STATES

COURT OF APPEALS FOR THE NINTH CIRCUIT

Post Office Box 193939

San Francisco, CA 94119-3939

SOLICITOR GENERAL OF THE UNITED STATES

Room 5614, Department of Justice

950 Pennsylvania Ave., N.W.

Washington, DC 20530-0001

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 16, 1999, at Los Angeles, California.

LILLIE L. VALENCIA